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No. 93-978

In the Supreme Court of the United States

OCTOBER TERM, 1993

IRWIN KOFF AND DARLINE RUTH KOFF, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held (i) that IRS Certificates of Assessments and Payments are presumptive proof that tax assessments have in fact been made and (ii) that such Certificates satisfy the requirement of 26 U.S.C. 6203 that a taxpayer be furnished, upon request, with a copy of the record of assessment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Arford v. *United States*, 934 F.2d 229 (9th Cir. 1991)	5
Beech Aircraft Corp. v. *Rainey*, 488 U.S. 153 (1988)	9
Brafman v. *United States*, 384 F.2d 863 (5th Cir. 1967)	8
Elias v. *Connett*, 908 F.2d 521 (9th Cir. 1990)	3
Geiselman v. *United States*, 961 F.2d 1 (1st Cir.), cert. denied, 113 S. Ct. 261 (1992)	8, 11
Gentry v. *United States*, 962 F.2d 555 (6th Cir. 1992)	8, 10
Guthrie v. *Sawyer*, 970 F.2d 733 (10th Cir. 1992)	8
Hansen v. *United States*, 7 F.3d 137 (9th Cir. 1993)	10
Hefti v. *Internal Revenue Service*, 8 F.3d 1169 (7th Cir. 1993)	11
Huff v. *United States*, 10 F.3d 1440 (9th Cir. 1993)	11
Hughes v. *United States*, 953 F.2d 531 (9th Cir. 1992)	8, 9, 10
Long v. *United States*, 972 F.2d 1174 (10th Cir. 1992)	7-8, 10
Palmer v. *Hoffman*, 318 U.S. 109 (1943)	9
Psaty v. *United States*, 442 F.2d 1154 (3d Cir. 1971)	8
Robinson v. *United States*, 920 F.2d 1157 (3d Cir. 1990)	7
Rocovich v. *United States*, 933 F.2d 991 (Fed. Cir. 1991)	8
United States v. *Bowers*, 920 F.2d 220 (4th Cir. 1990)	10
United States v. *Buford*, 889 F.2d 1406 (5th Cir. 1989)	8

Cases—Continued: Page

United States v. *Chila*, 871 F.2d 1015 (11th Cir.), cert. denied, 493 U.S. 975 (1989) 8, 11
United States v. *Farris*, 517 F.2d 226 (7th Cir.), cert. denied, 423 U.S. 892 (1975) 10
United States v. *Gerads*, 999 F.2d 1255 (8th Cir. 1993) . 7
United States v. *Hayes*, 861 F.2d 1225 (10th Cir. 1988) 9, 10
United States v. *Lorson Electric Co.*, 480 F.2d 554 (2d Cir. 1973) 8
United States v. *McCallum*, 970 F.2d 66 (5th Cir. 1992) 8
United States v. *Miller*, 318 F.2d 637 (7th Cir. 1963) 8
United States v. *Neff*, 615 F.2d 1235 (9th Cir.), cert. denied, 447 U.S. 925 (1980) 10
United States v. *Zolla*, 724 F.2d 808 (9th Cir.), cert. denied, 469 U.S. 830 (1984) 8
Wisniewski v. *United States*, 353 U.S. 901 (1957) 7

Statutes, regulation and rules:

Internal Revenue Code (26 U.S.C.):
§ 6203 ..... 5, 6, 10, 11
§ 6303(a) 3
28 U.S.C. 2410 ..... 2, 3, 4, 5, 6
Treas. Reg. § 301.6203-1 8
Fed. R. Evid.:
Rule 803(6) 9
Rule 803(8) 9
Rule 902(1) 9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 14-24) is reported at 3 F.3d 1297. The opinion of the district court (Pet. App. 29-32) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1993. The petition for a writ of certiorari was filed on November 30, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 8, 1991, petitioners commenced this action in federal district court, seeking to quiet title to certain of their property against which the Internal Revenue Service had filed tax lien notices and notices of levy (Pet. App. 16). Petitioners challenged the validity of the tax liens and levies on the ground that the IRS had not made any "appropriate" assessments against them. They requested the court to order the government either to produce copies of the assessments or to remove the liens from their property (Tr. Doc. 1, at 4). Petitioners asserted that 28 U.S.C. 2410 waived the sovereign immunity of the United States to this action as a "quiet title" suit (Pet. App. 16).

Petitioners asserted that they had filed a request under the Freedom of Information Act for a copy of the relevant assessments and that the IRS had responded that "the documents you requested do not exist" (Tr. Doc. 5, at 2).[1] Petitioners claimed that it was therefore evident

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[1] In fact, the IRS's response related to a different request made by petitioners—a request for the pages of the Federal Register on which certain delegation orders supposedly appeared—and had nothing to do with their request for copies of the assessments. In context, the IRS's response was as follows (Tr. Doc. 5, Exh. A-1(b); emphasis added):

> Please be advised that there is no requirement to publish delegation orders in the Federal Register. Consequently, this agency has not undertaken such an initiative, *and the documents you have requested do not exist.*

With respect to petitioners' request for copies of their tax assessments, the IRS did not say that there were no such records. Instead, the agency told petitioners to redirect their request to the local district director's office instead of the National Office (Tr. Doc. 5, Exh. A-1(b)).

that no valid assessments existed and that the IRS's notices of lien and levy were therefore without effect (Tr. Doc. 5, at 3).

The district court addressed this contention in an interlocutory order dated April 30, 1991 (Tr. Doc. 14). The court noted that, under the Ninth Circuit's decision in *Elias* v. *Connett*, 908 F.2d 521, 527 (1990), 28 U.S.C. 2410 affords no jurisdiction for a "quiet title" action based on the allegation that the taxes were not owed by the taxpayer or that the IRS had not made a lawful assessment of those taxes.[2] The court noted, however, that under *Elias* a taxpayer may allege that the IRS had failed to send a proper notice of assessment and demand for payment as required by 26 U.S.C. 6303(a). The court concluded that petitioners' pleadings in this case could fairly be construed as making such an allegation. Because the government indicated that it needed time to obtain the relevant Certificate of Assessments and Payments ("Form 4340") to document the issuance of the notice of assessment and demand for payment to petitioners, the court deferred its final ruling in the case (Tr. Doc. 14, at 4-5).

On July 8, 1991, the government filed with the court the Certificate of Assessments and Payments for each petitioner (Tr. Doc. 33, Exhs. A, B). Each of the Certificates was certified as "a true Form 4340, Certificate of Assessments and Payments" by the director of the Ogden, Utah, Service Center, who also "caused the seal of this office to be affixed" (*ibid.*). The Certificates showed that an assessment was made against each petitioner on

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[2] The district court also rejected petitioners' contention that the IRS's response to their Freedom of Information Act request indicated that assessments had not been made against them (Tr. Doc. 14, at 3 n.4). See note 1, *supra*.

October 30, 1989, and that a notice of assessment and demand for payment was sent to each petitioner on October 30, 1989, and again on December 11, 1989 (Tr. Doc. 33, at 3-4).[3]

The district court granted summary judgment to the government (Pet. App. 29-32). The court concluded that the Certificates of Assessments and Payments sufficiently established that notices of the assessments and demands for payment were in fact properly sent to taxpayers on October 30, 1989, and December 11, 1989. The court rejected petitioners' claim that the Certificates were untrustworthy and had been generated specifically for this litigation. The court noted that the underlying information had been stored in the IRS's computers, and the Certificates were simply compilations of this underlying information converted to terms that a lay person could understand (Pet. App. 31). See note 3, *supra*.

2. On appeal, petitioners again contended that the IRS had failed to make valid assessments against them. They urged that this allegation represented a *procedural* challenge to the assessment and was therefore within the scope of the "quiet title" action authorized by 28 U.S.C. 2410.

In a memorandum opinion filed October 23, 1992 (Pet. App. 25-28), the court of appeals affirmed the judgment of the district court. The court concluded that petitioners' contention that the IRS failed to make an appropriate assessment was a collateral attack on the merits of the as-

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[3] In a declaration submitted by an IRS Special Procedures Function adviser, it was explained that such Certificates are compiled from data in IRS computer transcripts, converted to terms that a lay person could understand. The adviser also attached copies of the actual computer transcripts to his declaration (Pet. App. 31-32; Tr. Doc. 40).

sessment which, under *Elias*, was outside the scope of the "quiet title" action authorized by 28 U.S.C. 2410. The court therefore concluded that there was no applicable waiver of sovereign immunity for this suit (Pet. App. 27-28).

Petitioners filed a petition for rehearing, contending that the panel's decision was in conflict with the Ninth Circuit's decision in *Arford* v. *United States*, 934 F.2d 229 (1991). In a published decision filed September 1, 1993, the court of appeals withdrew its prior memorandum decision but again affirmed the judgment of the district court. The published decision consisted of a *per curiam* opinion followed by concurring opinions by each of the three judges. In the *per curiam* opinion, the court first noted that the question whether the facts of this case fell within the waiver of sovereign immunity for "quiet title" actions under 28 U.S.C. 2410 "may be a question as to which our decisions [in *Elias* and *Arford*] are in conflict" (Pet. App. 17). The court stated that it would pass over this sovereign immunity question for the reasons stated in the separate opinions of the members of the panel (*ibid.*). On the merits, the court held (i) that, in the absence of any conflicting evidence, the Certificates of Assessments and Payments were sufficient to establish that the tax assessments were properly made and (ii) that the production of those Certificates met the requirement of 26 U.S.C. 6203 that a taxpayer be provided, upon request, with a copy of the record of the assessment (Pet. App. 17-18).

In his concurring opinion, Judge Ferguson pointed out that, while a difficult question was presented as to whether 28 U.S.C. 2410 represented a waiver of sovereign immunity for this action, petitioners' arguments on the merits were entirely without substance. Judge Ferguson concluded that the court should apply the doctrine

of "hypothetical jurisdiction" and assume without deciding that jurisdiction exists and proceed to a decision on the merits (Pet. App. 18-19).

Judge O'Scannlain, by contrast, maintained that the court was not entitled to assume that it had jurisdiction and must decide that issue at the outset. Because, in his view, *Elias* and *Arford* were plainly in conflict, the panel should recommend *en banc* consideration of that issue (Pet. App. 19-21). Although he believed that the panel should not reach the merits, Judge O'Scannlain stated that "the *per curiam* opinion represents the proper resolution of the taxpayers' arguments in this case" (Pet. App. 19).

Finally, Judge Rymer wrote separately to express her view that *Elias* and *Arford* were not in conflict. According to Judge Rymer, to the extent that petitioners were alleging that a proper assessment had not been made against them, their claim was jurisdictionally barred under *Elias*. To the extent, however, that petitioners were alleging that the assessment procedures of 26 U.S.C. 6203 were not properly followed—due to a claimed defect in the recording of the assessment or in the transmission of a copy of the record of assessment—their claim was cognizable under 28 U.S.C. 2410 (Pet. App. 23-24).

ARGUMENT

1. Although petitioners list, as a question presented, whether 28 U.S.C. 2410 waives sovereign immunity with respect to challenges to federal tax liens in which it is asserted that an assessment has not been properly made (Pet. App. i), this question is not in fact presented in this case. The court of appeals did not reach the issue of sovereign immunity. Instead, the court proceeded directly to the merits of petitioners' claim. That claim was decided adversely to petitioners on the merits. If the

court of appeals had reached the sovereign immunity issue, and decided it favorably to petitioners, the outcome in this case would not have been affected. The court would then have considered petitioners' claim on the merits—which is, of course, precisely what the court did in any event. Since the court of appeals did not decide this case adversely to petitioners on the basis of sovereign immunity, the sovereign immunity question is not properly presented in this case.[4]

2. a. On the merits, the court of appeals correctly held (Pet. App. 17-18) that the Certificates of Assessments and Payments submitted by the government represent presumptive proof that an assessment was in fact made. The courts have consistently held that, absent some evidence to the contrary (and none was presented by petitioners here),[5] Certificates of Assessments and Payments are sufficient to establish not only the issuance of notices and demands but also the existence and procedural regularity of the assessments. *United States* v. *Gerads*, 999 F.2d 1255, 1256 (8th Cir. 1993); *Long* v. *United*

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[4] Even if the sovereign immunity question were properly presented, the "conflicts" cited by petitioners would not warrant further review. The alleged intra-circuit conflict between the Ninth Circuit's decisions in *Elias* and *Arford*, if such there be, is a matter for the Ninth Circuit to resolve. As this Court stated in *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957), "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." While petitioners contend that there is also a conflict between the Ninth Circuit's decision in *Elias* and the Third Circuit's decision in *Robinson* v. *United States*, 920 F.2d 1157 (3d Cir. 1990), the Third Circuit was far from certain of this because it found the *Elias* opinion to be unclear in its discussion of the scope of 28 U.S.C. 2410. See *Robinson* v. *United States*, 920 F.2d at 1161.

[5] The sole evidentiary basis for petitioners' contention that no assessment records existed was a sentence from an IRS letter that was taken out of context. See notes 1 & 2, *supra*.

States, 972 F.2d 1174, 1181 (10th Cir. 1992); *United States* v. *McCallum*, 970 F.2d 66, 70-71 (5th Cir. 1992); *Guthrie* v. *Sawyer*, 970 F.2d 733, 737-738 (10th Cir. 1992); *Gentry* v. *United States*, 962 F.2d 555, 557 (6th Cir. 1992); *Geiselman* v. *United States*, 961 F.2d 1, 6 (1st Cir.), cert. denied, 113 S.Ct. 261 (1992); *Hughes* v. *United States*, 953 F.2d 531, 535 (9th Cir. 1992); *Rocovich* v. *United States*, 933 F.2d 991, 994-995 (Fed. Cir. 1991); *United States* v. *Chila*, 871 F.2d 1015, 1017-1018 (11th Cir.), cert. denied, 493 U.S. 975 (1989); *United States* v. *Zolla*, 724 F.2d 808, 810 (9th Cir.), cert. denied, 469 U.S. 830 (1984); *United States* v. *Lorson Electric Co.*, 480 F.2d 554, 555 (2d Cir. 1973); *Psaty* v. *United States*, 442 F.2d 1154, 1159 (3d Cir. 1971); *United States* v. *Miller*, 318 F.2d 637, 639 (7th Cir. 1963).[6]

b. It is also clear that the Certificates of Assessments and Payments were admissible in evidence and

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[6] Contrary to petitioners' contention (Pet. 9-11), *United States* v. *Buford*, 889 F.2d 1406 (5th Cir. 1989), is not to the contrary. In *Buford*, the court of appeals held that a criminal defendant was entitled to an *in camera* inspection of his individual master file in order to resolve a conflict in the evidence between the Certificates of Assessments and Payments and other IRS records. 889 F.2d at 1408. The court reversed the conviction on another ground. *Id.* at 1409. Since there is no conflict in the evidence in this case as to whether the assessments were in fact made, this case is readily distinguishable from *Buford*.

Petitioners also err in contending (Pet. 10) that the decision in this case conflicts with *Brafman* v. *United States*, 384 F.2d 863 (5th Cir. 1967), which held that, since an "assessment certificate" submitted by the government as proof of an assessment was not signed, as required by Treas. Reg. § 301.6203-1, it did not constitute a valid assessment. 384 F.2d at 865-866. In the present case, there were no defects on the face of the Certificates of Assessments and Payments and there is no evidence that the assessment certificates were not signed.

were thus properly used in support of the government's motion for summary judgment. Rule 803(8) of the Federal Rules of Evidence provides that the following items are not excluded from evidence under the hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law * * *.

As the court held in *Hughes* v. *United States*, 953 F.2d 531, 539-540 (9th Cir. 1992), Certificates of Assessments and Payments qualify as "[r]ecords, reports, * * * or data compilations" within this hearsay rule exception.[7]

The Certificates in the case at bar were also properly authenticated because they were certified under seal. Federal Rule of Evidence 902(1) provides that public doc-

[7] Petitioners err in relying (Pet. 11) on *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), to support their contention that the Certificates of Assessments and Payments should have been excluded from evidence. Petitioners cite the narrow interpretation in *Palmer* of the phrase "'in the regular course' of business" within the meaning of a statute which predated the Federal Rules of Evidence. See 318 U.S. at 111. Since Federal Rule of Evidence 803(8), which governs the admissibility of the Certificates here, does not contain this phrase, or any parallel restriction, *Palmer* is not applicable to this case. By contrast, Federal Rule of Evidence 803(6), which deals with business records, includes a restriction that the record be "kept in the course of a regularly conducted business activity." Cf. *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153 (1988) (Navy investigative report held admissible under Fed. R. Evid. 803(8)). In any event, unlike the report at issue in *Palmer*, IRS Certificates of Assessments and Payments are derived from preexisting computer records which are kept in the ordinary course of business. See *United States* v. *Hayes*, 861 F.2d 1225, 1228 (10th Cir. 1988).

uments under seal are self-authenticating. See *Hughes* v. *United States*, 953 F.2d at 540. The courts have thus consistently found Certificates of Assessments and Payments to be admissible. See, *e.g.*, *Hansen* v. *United States*, 7 F.3d 137, 138 (9th Cir. 1993); *Long* v. *United States*, 972 F.2d 1174, 1181 (10th Cir. 1992); *United States* v. *Bowers*, 920 F.2d 220, 223-224 (4th Cir. 1990); *United States* v. *Neff*, 615 F.2d 1235, 1241 (9th Cir.), cert. denied, 447 U.S. 925 (1980). See also *United States* v. *Farris*, 517 F.2d 226, 227-229 (7th Cir.) (self-authenticating IRS computer printouts are admissible in evidence), cert. denied, 423 U.S. 892 (1975).[8]

c. The court of appeals also correctly held that Certificates of Assessments and Payments satisfy the requirement of 26 U.S.C. 6203 that a copy of the record of assessment be provided to taxpayers upon request. As explained by the Sixth Circuit, in *Gentry v. United States*, 962 F.2d at 558:

> The Treasury Regulations specify that the taxpayer is entitled to a copy of the pertinent parts of the assessment documents. Those pertinent parts need only provide the five items listed in [Treas. Reg. § 301.6203] * * *. Neither the Tax Code nor the Treasury Regulations require those pertinent parts to be original documents, and the IRS has selected the certificate of assessments and payments as the

[8] Throughout the petition (Pet. 4, 8, 11, 12, 13), petitioners assert that Certificates of Assessments and Payments are created for purposes of pending litigation. As the district court noted (Pet. App. 31), however, while the particular pieces of paper may not have previously been in existence, the information in the Certificates is derived from data maintained in IRS computers in the ordinary course of business. See also note 3, *supra*; *United States* v. *Hayes*, 861 F.2d at 1228.

> means for providing the information specified. * * * [T]he Certificate here comported with the Treasury Regulations' requirements.

Accord, *Hefti* v. *Internal Revenue Service*, 8 F.3d 1169, 1172 (7th Cir. 1993) ("the Certificates of Assessments and Payments offered by the government in support of its motion for summary judgment meet the requirements of Treas. Reg. § 301.6203-1, as they contain all of the necessary information"). See also *Geiselman* v. *United States*, 961 F.2d at 5-6; *United States* v. *Chila*, 871 F.2d at 1018.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] The Ninth Circuit's subsequent decision in *Huff* v. *United States*, 10 F.3d 1440 (1993), is not to the contrary. The court in *Huff* did not dispute that furnishing the taxpayer with a copy of the Certificate of Assessments and Payments would generally meet the requirements of 26 U.S.C. 6203, but it remanded the case for further findings because the record in that case was "devoid of any indication that the [taxpayers] were provided with copies of these forms [Forms 4340—Certificates of Assessments and Payments] in response to their request for a copy of their assessments." 10 F.3d at 1446.